

In The
Supreme Court of the United States
 October Term, 1991

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DONATO D'ONOFRIO,

v.

Petitioner,

W. CARY EDWARDS, ATTORNEY GENERAL OF
 NEW JERSEY, JOHN F. VASSALLO, JR., DIRECTOR,
 DIVISION OF ALCOHOLIC BEVERAGE CONTROL,
 and NEW JERSEY LICENSED BEVERAGE
 ASSOCIATION,

Respondents.

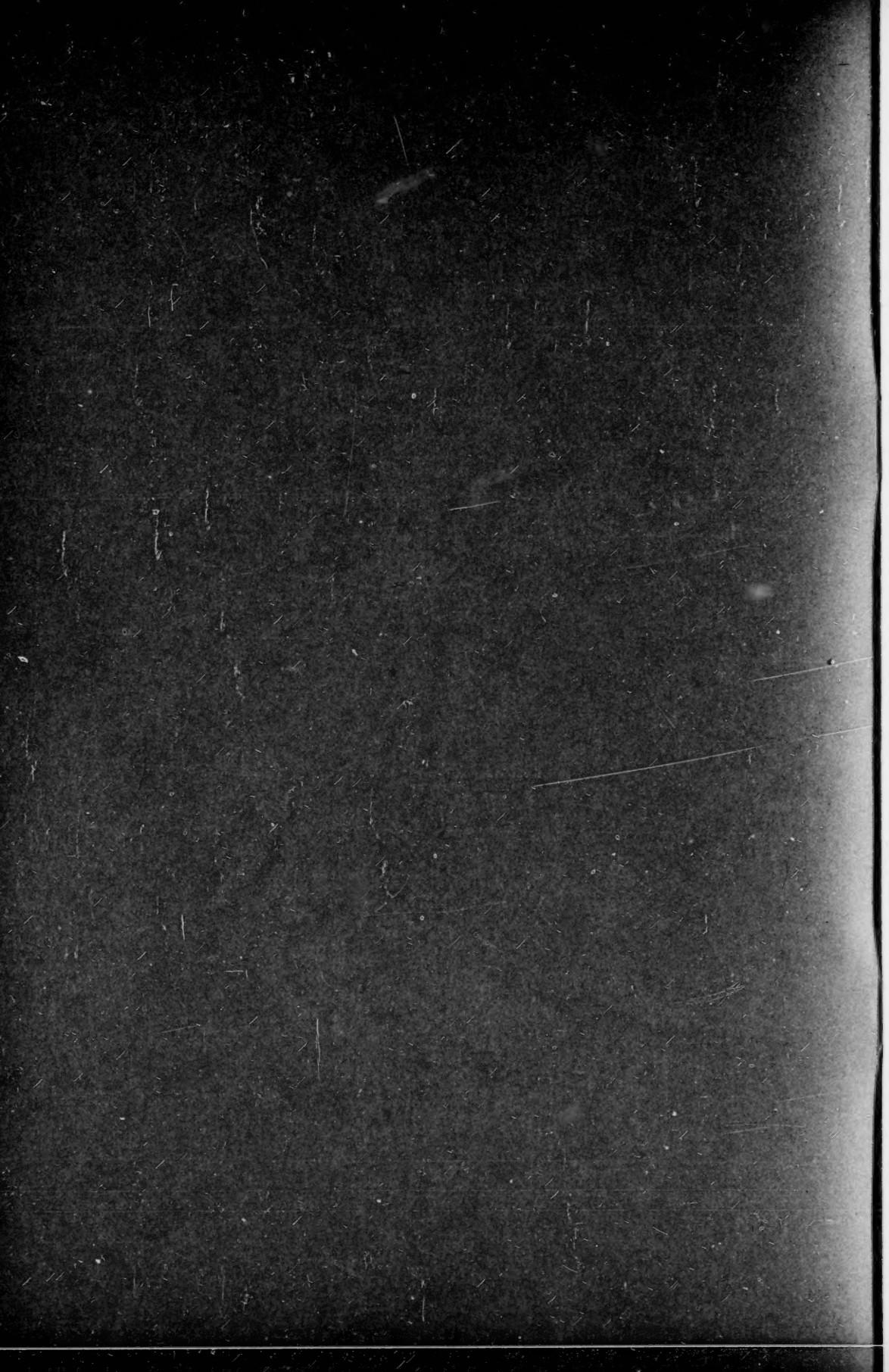
**Petition For Writ Of Certiorari To The
 Superior Court Of New Jersey, Appellate Division**

**BRIEF IN OPPOSITION TO PETITION FOR A
 WRIT OF CERTIORARI ON BEHALF OF RESPON-
 DENTS ATTORNEY GENERAL OF
 NEW JERSEY AND THE DIVISION OF
 ALCOHOLIC BEVERAGE CONTROL**

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QUESTION PRESENTED

Does a 1962 New Jersey statute limiting to two the number of alcoholic beverage retail licenses a person may hold and which, through operation of a companion statute, contains exceptions for certain hotels, restaurants, certain bowling alleys and international airports, deny equal protection of the law under the Fourteenth Amendment of the United States Constitution?

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STATEMENT OF THE CASE

N.J.S.A. 33:1-12.31, also known as the two-license limitation statute, provides that no person shall acquire a beneficial interest in more than a total of two alcoholic beverage retail licenses. That statute is part of a unified legislative policy limiting the number of retail liquor licenses in New Jersey. The number of retail liquor licenses that can be issued is also limited by population per municipality. *N.J.S.A.* 33:1-12.14, 33:1-12.15. *N.J.S.A.* 33:1-12.21 authorizes municipalities to promulgate regulations to further limit numbers of liquor licenses.

N.J.S.A. 33:1-12.32 contains exceptions to the two-license limitation statute. The original exception applied to those holding liquor licenses in connection with the operation of certain hotels. That statute was amended in 1964 to permit a further exception for liquor licenses used in connection with restaurants. *N.J.S.A.* 33:1-12.32 was further amended in 1983 to grant an exception for licenses used in connection with certain bowling alleys. In 1985, an additional exception was made for use of licenses within the grounds of international airports. Also, *N.J.S.A.* 33:1-12.35, the "grandfather" provision, preserved the interests in multiple licenses prior to August 3, 1962, the effective date of *N.J.S.A.* 33:1-12.31.

The Supreme Court of New Jersey unanimously upheld the constitutionality of *N.J.S.A.* 33:1-12.31 in *Grand Union v. Sills*, 43 N.J. 390, 204 A.2d 853 (1964). In affirming the constitutionality of that statute, the Court found its public purpose was reasonably related to the State's policies favoring trade stability and the promotion

of temperance, *id.* at 404, 204 A.2d at 859, and did not violate principles of equal protection or due process. *Id.* at 404-05, 204 A.2d at 860-61.

In 1979 the New Jersey State Division of Alcoholic Beverage Control adopted new regulations eliminating retail price maintenance ("deregulation rules"). Those regulations eliminated retail price fixing except for a prohibition against sales below cost. *N.J. Admin. Code* § 13:2-24.8 (1980). The deregulation rules were challenged in *Heir v. Degnan*, 82 N.J. 109, 411 A.2d 194 (1980). In affirming those regulations, the New Jersey Supreme Court determined that the deregulation rules did not impair the "longstanding public policy of maintaining stability in the liquor industry and promoting temperance." *Id.* at 120, 411 A.2d at 199.

Donato D'Onofrio is the holder of more than two liquor licenses and alleges that the application of *N.J.S.A.* 33:1-12.31 thwarts his desire to acquire additional licenses and to later transfer his licenses to his children, each of whom presently holds interests in at least two licenses. He also claims that the two-license limitation prevents him from competing effectively in the liquor industry. However, it should be noted that D'Onofrio has not had an application for an additional license denied on the basis of that statute; nor does the record contain any evidence whatsoever to support the assertion that he has been denied the ability to compete in the retail liquor industry.

On September 21, 1988 D'Onofrio filed a complaint against the Attorney General of New Jersey and the Director of the New Jersey Division of Alcoholic Beverage Control ("State respondents") in the Chancery Division seeking a declaratory judgment that *N.J.S.A.* 33:1-12.31 is unconstitutional. Thereafter, the New Jersey

Licensed Beverage Association was granted the right to intervene as a party defendant.

On February 2, 1990 the chancery court granted the State respondents' motion for summary judgment and concluded that N.J.S.A. 33:1-12.31 did not deprive D'Onofrio of any rights under the New Jersey or United States Constitutions. Although D'Onofrio argued that the economic conditions and social attitudes underlying deregulation represent a dramatic reversal of regulatory attitude which, when coupled with subsequent exceptions to the two-license limitation set forth in N.J.S.A. 33:1-12.32, cause the continued enforcement of N.J.S.A. 33:1-12.31 to be arbitrary and unreasonable, the trial court rejected this argument and stated that the express policy of New Jersey is still to foster temperance and promote trade stability (Pa 11). The Appellate Division affirmed substantially for the reasons stated by the chancery judge and held that the legislative policies underlying the statute continue to be supportable and that the statute constitutes a legitimate exercise of the police power (Pa 4).

D'Onofrio petitioned the State's highest court for review of the intermediate appellate court's decision, and, in an order filed May 16, 1991, the New Jersey Supreme Court denied the application without comment (Pa 1-2). D'Onofrio filed a petition for *certiorari* with this Court on August 14, 1991 which was received by the State respondents on August 15, 1991.

SUMMARY OF REASONS FOR DENYING THE PETITION

1. N.J.S.A. 33:1-12.31 constitutes a legitimate exercise of New Jersey's police power under the Twenty-First Amendment, pursuant to which states have absolute power to ban the sale of alcoholic beverages within their boundaries and have authority to regulate the circumstances under which liquor may be sold. *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S.Ct. 599, 69 L.Ed.2d 357 (1981).

2. The petition should be denied because the courts below merely applied the long-settled principle that the State's authority to regulate the liquor industry constitutes a proper exercise of the police power. *California v. LaRue*, 409 U.S. 109, 114, 93 S.Ct. 390, 395, 34 L.Ed.2d 342, 349-50 (1972); *Grand Union v. Sills*, *supra*, 43 N.J. at 403, 204 A.2d at 860.

3. It is well established that states are free to adopt differing means of regulation, especially when those regulations concern policies reserved to states under the police power, and accordingly, the Nebraska state court decision invalidating its two-license limitation statute in *Casey's Gen. Stores v. Nebraska Liquor Cont. Comm.*, 220 Neb. 242, 369 N.W.2d 85 (1985) is of no import. *California v. LaRue*, *supra*, 409 U.S. at 116, 93 S.Ct. at 396, 34 L.Ed.2d at 350; *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563, 573 (1955); *Libertarian Party of Fla. v. Florida*, 710 F.2d 790, 793 (11th Cir. 1983), cert. denied, 469 U.S. 831, 105 S.Ct. 117, 83 L.Ed.2d 60 (1984).

4. The opinions below correctly concluded that, notwithstanding the State's deregulation of liquor prices and additional exceptions to the statute, the restriction on

owning more than two retail licenses continues to further the legislative objectives of promoting temperance and maintaining trade stability. As the New Jersey Legislature's justification for the statute is "at least debatable," a federal court should not find a denial of equal protection. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469, 101 S.Ct. 715, 725, 66 L.Ed.2d 659, 672 (1981); *United States v. Carolene Products Co.*, 304 U.S. 144, 154, 58 S.Ct. 778, 784, 82 L.Ed. 1234, 1243 (1938).

REASONS FOR DENYING THE PETITION

At issue is whether N.J.S.A. 33:1-12.31, which prohibits anyone in New Jersey from holding more than two retail liquor licenses, continues to be constitutional in light of changes in liquor laws and regulations, including additional exceptions to the two-license limitation expressed in N.J.S.A. 33:1-12.32 and the State's deregulation of retail liquor prices in 1979. There are no special and important reasons why the Court should review this case. *Sup.Ct.R.* 10. The opinions below merely applied the well established principle that the State's authority to regulate the liquor industry constitutes a proper exercise of the police power. *California v. LaRue, supra*, 409 U.S. at 114, 93 S.Ct. at 395, 34 L.Ed.2d at 349-50; *Grand Union v. Sills, supra*, 43 N.J. at 403, 204 A.2d at 860. Just such a case, and nothing more, is before the Court on this petition.

The State of New Jersey has a legitimate interest in regulating the number of liquor licenses issued to persons, regardless of the effect of restricting the transferability of licenses to those at or beyond their statutory

quota. *Id.* at 404-05, 204 A.2d at 860-61. There is a strong presumption of constitutionality in the area of liquor industry regulation. *New York State Liquor Authority v. Bellanca, supra; California v. LaRue, supra; Cafe Gallery, Inc. v. State*, 189 N.J. Super. 468, 462 A.2d 227 (Law Div. 1983). Traditionally, states have a wide latitude of discretion in enacting legislation under their police power. *Williamson v. Lee Optical of Oklahoma, supra*, 348 U.S. at 489, 75 S.Ct. at 465, 99 L.Ed. at 573. Reasonable regulations necessary to accomplish legitimate goals will not be held unconstitutional even if they restrict profits, *Exxon Corp. v. Federal Energy Administration*, 417 F. Supp. 516 (D.N.J. 1975), or diminish the value of established property interests, *Troy v. Renna*, 727 F.2d 287, 301-02 (3d Cir. 1984); *In re Ashe*, 669 F.2d 105, 110 (3d Cir. 1982); *Rogin v. Bensalem Township*, 616 F.2d 680, 692 (3d Cir. 1980).

Furthermore, the selling of alcoholic beverages is not a constitutional right. *Crowley v. Christensen*, 137 U.S. 86, 91, 11 S.Ct. 13, 15, 34 L.Ed. 620, 624 (1890); *Sea Girt Restaurant v. Borough of Sea Girt*, 625 F. Supp. 1482, 1485 (D.N.J. 1986), aff'd, 802 F.2d 448 (1986); *Joseph H. Reinfeld, Inc. v. Schieffelin & Co.*, 94 N.J. 400, 412, 466 A.2d 563, 569 (1983). In fact, the Twenty-First Amendment confers upon states the absolute power to ban the sale of alcoholic beverages within their boundaries and the authority to regulate the circumstances under which liquor may be sold. *New York State Liquor Authority v. Bellanca, supra*. Therefore, absent a demonstration that N.J.S.A. 33:1-12.31 is unreasonable, it must be presumed rationally related to the regulation of the sale of liquor. *Schweiker v. Wilson*, 450 U.S. 221, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981); *U.S.A. Chamber of Commerce v. State*, 89 N.J. 131, 157-58 (1982).

The question of whether the application of N.J.S.A. 33:1-12.31 impermissibly thwarts D'Onofrio's desire to acquire additional package liquor stores was adequately considered by the courts below. Their reasons for upholding that statute were based on a sufficient record and persuasive precedent, including the prior determination by the New Jersey Supreme Court in *Grand Union v. Sills* that N.J.S.A. 33:1-12.31 does not deny equal protection. In *Grand Union*, certain retail liquor licensees alleged that the statute had no observable public purpose, was enacted only for the enhancement of private competitive interests and was, therefore, arbitrary and discriminatory. 43 N.J. at 395, 204 A.2d at 855. In reaching the conclusion that the statute did not deny equal protection, the State Supreme Court found that

Chapter 152 [N.J.S.A. 33:1-12.31] applies equally and indiscriminately by its terms to all retail licensees similarly situated, and to the extent that it is aimed at chain liquor store operations it cannot judicially be said to be either irrational or invidious. Indeed, the rationality and validity of various legislative enactments differentiating chain store operations from individual store operations have been recognized even in cases dealing with commodities which are essential in nature and are subject to much lesser regulation than liquor. [43 N.J. at 405, 204 A.2d at 861, citations omitted.]

Accordingly, the *Grand Union* Court upheld the validity of N.J.S.A. 33:1-12.31 on the basis that the legislature recognized that without such a limitation

absentee ownership or domination of retail establishments by distillers or other economically powerful interests, or the concentration of

retailing in the hands of an economically powerful few, would intensify the dangers of sales stimulations and other abuses and would be inimical to temperance and trade stability. . . . As was acknowledged by the appellants' experts, chain liquor stores would economically be the most capable of . . . growth through displacement of individual retail operators. Admittedly their mode of operations furthers absentee ownership in this highly susceptible branch of trade. [43 N.J. at 402-03, 204 A.2d at 859.]

The New Jersey Supreme Court therefore concluded that "while some may consider other regulatory courses to be preferable" there was sufficient evidence to support the conclusion that *N.J.S.A. 33:1-12.31* was rationally related to legitimate legislative policies. *Id.* at 404-05, 204 A.2d at 860.

In this case, the courts below agreed that *Grand Union* continues to control and the restriction on owning more than two retail licenses constitutes a proper use of the police power. In addition, it is clear that the operation of the two-license limitation statute and the exceptions contained in *N.J.S.A. 33:1-12.32* have uniform application to all licensees. Further, the courts rejected D'Onofrio's claim that the deregulation rules somehow altered the liquor laws to the extent that the two-license limitation statute no longer bears a reasonable relationship to any proper current policy objective. On the contrary, the chancery judge found that

Deregulation of prices requires even more strict regulation of the field to protect the public welfare. [Pa 11.]

Likewise, the Appellate Division concluded that

In our view, the legislative finding that the restriction on owning more than two retail licenses encourages competition and maintains trade stability is still reasonably supportable and the restriction constitutes a legitimate use of the police power. [Pa 4.]

In fact, in *Heir v. Degnan, supra*, which rejected a challenge to the deregulation rules, the New Jersey Supreme Court explicitly endorsed its previous decision upholding the constitutionality of the two-license limitation statute contained in *Grand Union*. 82 N.J. at 120, 411 A.2d at 199.

Clearly, the courts below properly determined that the New Jersey Supreme Court decisions upholding the constitutionality of N.J.S.A. 33:1-12.31 and the legislative policies supporting that statute continue to apply. D'Onofrio, as the holder of more than two licenses by virtue of the "grandfather" clause contained in N.J.S.A. 33:1-12.35, has no cause to complain that he has been economically disadvantaged; nor does the record in this matter contain any evidence whatsoever to support the assertion that he has been "denied the right to compete freely" in the retail liquor industry.

D'Onofrio's argument that a Nebraska decision invalidating its two-license limitation should apply here is also without merit. In *Casey's Gen. Stores v. Nebraska Liquor Cont. Comm., supra*, the state supreme court found Nebraska's statute to deny equal protection because it no longer furthered legislative policies. That determination was based in part on later findings by the Nebraska Legislature that liquor consumption was inelastic, and accordingly, the court found that the statute no longer

promoted temperance. 369 N.W.2d at 88. However, the New Jersey Supreme Court said otherwise, *i.e.*, that liquor consumption is elastic. *Grand Union v. Sills, supra*, 43 N.J. at 402, 204 A.2d at 859. Thus, there is no conflict with the Nebraska decision. Moreover, it has long been established that states are free to adopt differing means of regulation, especially when those regulations concern policies reserved to states under the police power. *California v. LaRue, supra*, 409 U.S. at 116, 93 S.Ct. at 396, 34 L.Ed.2d at 350; *Williamson v. Lee Optical of Oklahoma, supra*, 348 U.S. at 489, 75 S.Ct. at 465, 99 L.Ed. at 573; *Libertarian Party of Fla. v. Florida, supra*, 710 F.2d at 793.

Pursuant to their police power, other states have also fashioned methods of limiting package goods licenses that have withstood challenges on equal protection grounds. See e.g., *Johnston v. Matignetti*, 374 Mass. 784, 375 N.E.2d 290 (Mass. 1978) (three-license limitation that applied to package goods store owners but not to restaurateurs furthered policies of temperance and trade stability and did not violate equal protection); *Fargo Beverage Co. v. City of Fargo*, 459 N.W.2d 770 (N.D. 1990) (municipality's numerical limitation on licenses which prevented transfer of license to package goods store but which exempted hotels did not deny equal protection). See also *Brown v. City of Lake Geneva*, 919 F.2d 1299 (7th Cir. 1990) (denial of liquor license to bed and breakfast owner having a limited museum under statute permitting a city to supplement its allotment of licenses with respect to museum-restaurants did not deny equal protection). These cases illustrate the principle that states are afforded wide discretion in fashioning laws governing the limitation of liquor licenses. Accordingly, New Jersey is entitled

to enact laws under its police power to control the licensing of liquor establishments in furtherance of its own legislative policies and the Nebraska state court decision in *Casey's* is therefore of no import.

As long as there is a rational relation between a state's purpose and a statute, federal courts have no authority to pass on the judgment of the wisdom of legislative policy determinations. *Martinez v. California*, 444 U.S. 277, 283, 100 S.Ct. 553, 558, 62 L.Ed.2d 481, 487-88 (1986); *Ferguson v. Skrupa*, 372 U.S. 726, 729, 83 S.Ct. 1028, 1030, 10 L.Ed.2d 93, 96 (1963). Federal courts are especially deferential when a challenge to an economic regulation is based solely on equal protection grounds. *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 2516-17, 49 L.Ed.2d 511, 516-17 (1976). In this case, further review of the validity of N.J.S.A. 33:1-12.31 should be denied because the New Jersey Legislature rationally concluded that the statute furthered the policies of temperance and trade stability. Unlike the Nebraska Legislature, the New Jersey Legislature determined that consumption of liquor is elastic and that the restriction on licenses to sell package goods promotes temperance. *Grand Union v. Silis*, *supra*, 43 N.J. at 402, 204 A.2d at 859. As the New Jersey Legislature's justification for the statute is "at least debatable," a court should not find a denial of equal protection. *Minnesota v. Clover Leaf Creamery Co.*, *supra*, 449 U.S. at 469, 101 S.Ct. at 725, 66 L.Ed.2d at 672, quoting *United States v. Carolene Products Co.*, *supra*, 304 U.S. at 154, 58 S.Ct. at 784, 82 L.Ed. at 1243.

In conclusion, careful review and analysis of New Jersey Supreme Court precedent reveals that the

two-license limitation statute furthers legitimate State legislative policies and does not deny equal protection. The State court opinion at issue applied this well established precedent to determine that D'Onofrio was not denied equal protection. This conclusion presents no special and important reasons requiring further review by this Court and D'Onofrio's petition for a writ of *certiorari* should therefore be denied.

CONCLUSION

For the foregoing reasons the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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Dated: September 13, 1991

